No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

JERRY D. GILMORE,

Petitioner,

—vs.—

KEVIN TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE ON BEHALF OF NICHOLAS deB. KATZENBACH, EDWARD H. LEVI, et al. IN SUPPORT OF THE RESPONDENT

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ISSUE PRESENTED

Does the respondent's claim for relief in federal habeas corpus, namely that the state denied him an opportunity to be heard before the jury regarding factual issues the state had made dispositive, necessarily depend on a genuine change in the federal legal standards that were in place at the time his conviction became final?

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STATEMENT OF THE CASE

Under Illinois law, a criminal defendant cannot be convicted of murder even though the prosecution sustains its burden of proving the elements of that offense, and must instead be convicted of manslaughter, if the accused demonstrates that he or she acted under a sudden and intense passion produced by serious provocation. The respondent, Kevin Taylor, was charged with murder. His trial testimony tended to show that he should be acquitted on the murder charge and convicted of manslaughter--on the basis of provocation and passion. The trial judge concluded that Taylor's testimony warranted a jury instruction on manslaughter.

The judge initially instructed the jury that it should convict for murder if it concluded that the prosecution had proven the elements of that offense. Thereafter, the judge instructed the jury that it should convict for manslaughter if it concluded that

Taylor had acted under the necessary passion and provocation. The petitioner, Warden Gilmore, concedes that, recited in that order, those instructions may have given the jury the false impression that it could convict for murder if it found the prosecution's proof of murder sufficient, even though it also found Taylor's testimony sufficient to establish the passion and provocation prerequisites for manslaughter. Thus Gilmore concedes that the instructions "potentially removed an affirmative defense from the jury's consideration." Brief for Petitioner at 19-20.

The jury convicted Taylor of murder. In federal habeas corpus, he now contends that, having made passion and provocation determinative of a lesser level of culpability than is required for murder, the state may not withdraw those very issues from the trier of fact, via jury instructions. Taylor thus claims that the instructions read

to his jury denied him an opportunity to be heard, by the only decision-making authority that counted, on the only factual issues that counted.[1]

Gilmore contends that if this claim has merit, it is only because the applicable federal constitutional principles have changed since Taylor's conviction became final. Accordingly, Gilmore argues that the claim cannot be considered in federal habeas corpus under this Court's decision in Teague v. Lane, 489 U.S. 288 (1989), and its progeny. The lower court unanimously rejected Gilmore's argument in an opinion by Judge Flaum, joined by Judge Posner and Judge Manion. Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992).

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[1] The state aggravated this due process violation by making Taylor the instrument of his own downfall, i.e., by inviting him to take the stand and admit to key elements of the prosecution's case for murder in order to establish the prerequisites for manslaughter, a matter the jury was then effectively instructed to ignore.

STATEMENT OF INTEREST

This brief is filed on behalf of forty-five individuals. They include former Attorneys General of the United States and of several states, former state and federal trial and appellate judges, former Senators and Representatives, and former prosecutors. They include practicing attorneys, law school professors, and community leaders in other professions. They are men and women, Democrats and Republicans. Most importantly, they reflect an extraordinary depth and breadth of experience in every aspect of our criminal justice system. Their common interest and concern is that federal habeas review continue to be available to state prisoners who have been unconstitutionally convicted and sentenced.

In their briefs, the parties frame Taylor's precise claim for federal habeas corpus relief and the constitutional standard on which it depends, and then explore the

precedents in place at the time Taylor's conviction became final to determine whether that standard emerges from those precedents. This amicus curiae brief supplements the parties' treatment of the procedural due process principles and relevant case law by addressing the general "retroactivity" framework established by Teague v. Lane, supra, and subsequent decisions.

SUMMARY OF ARGUMENT

In Griffith v. Kentucky, 479 U.S. 314 (1987), and Teague v. Lane, supra, this Court embraced two central features of Justice Harlan's views on "retroactivity"--his view that shifts in federal constitutional law should not ordinarily be announced and applied in habeas corpus and his analysis of what counts as a genuine change in the law. Thus the Court's recent "retroactivity" decisions hold only that a federal court cannot award habeas relief on the basis of a principle of federal law for which the precedents in existence at the time the petitioner's sentence became final cannot fairly be said to stand. True to Justice Harlan's views, those decisions do not fundamentally alter the way the federal habeas courts have always assessed the novelty of legal standards.

The key issue in a retroactivity case is a temporal "choice of law" question. The

state endorses one legal standard and insists that the petitioner necessarily relies on a later-developing standard. In response, the petitioner contends that his claim rests on the legal standard in place when the state courts acted. The federal court is obliged, then, to "choose" the appropriate standard for adjudication in habeas corpus. Thus the court's task is to identify the proper legal standard and then to apply that standard to the petitioner's claim de novo.

Warden Gilmore persists in a deeply mistaken understanding of the meaning of new rules within the Court's current framework. He conflates a federal court's law-choosing function with its law-applying function. In Gilmore's view, a federal court creates "new" law whenever it applies a settled legal standard and reaches a conclusion different from the conclusion the state courts erroneously, but "reasonably," reached--when they applied the same legal standard to the

facts of the prisoner's case. If Teague meant that, it would amount to a deferential "standard of review" for appraising the work of the state courts. Yet as Justice O'Connor and Justice Kennedy have explained, Teague does not establish any such across-the-board rule of deference.

This Court's approach to the retroactive application of changes in the law does not conflict with the federal courts' statutory responsibility to apply settled law. Teague is not a flank attack on Brown v. Allen, 344 U.S. 443 (1953). By contrast, Teague presupposes Brown and, accordingly, the federal habeas courts' continuing authority and obligation to determine properly presented claims resting on settled federal law to the best of their ability.

Like other procedural barriers that prisoners must clear in order to put the merits of their claims before a federal habeas court, Teague's retroactivity doctrine

fixes a prerequisite to adjudication on the merits. If a claim can be sustained only by announcing and applying a new federal legal standard in support, the claim is not properly before a federal court in habeas corpus--except in special circumstances.

There is no single definition of "new rules" for all occasions.[2] As Justice Harlan warned, these matters are far too complex for that. If, indeed, the lower courts were to seize upon some simplistic formulation, they might reach equally simplistic results and thus fail to perform the function this Court's analysis alots to them: to deter state court violations of existing legal standards.

Clearly, genuine changes in the law occur when a settled legal standard that would lead to one result with respect to a

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[2] Compare Murray v. Carrier, 477 U.S. 478, 486 (1986)(noting there is no simple test for "cause" within the Court's framework for procedural default cases).

petitioner's claim is discarded in favor of a different legal standard that generates another outcome--when decisions overrule established precedents, explicitly or implicitly, or abandon longstanding and widely accepted practices. Just as clearly, courts do not ordinarily create new legal rules when they apply existing standards to different patterns of historical fact. If the routine application of settled law created entirely new rules, then, again, the Court's retroactivity analysis would be on a collision course with the Habeas Corpus Act.

The statement in Teague that a rule is new if it was not "dictated" by precedent at the time the state courts acted cannot be understood to mean that the only rules that are settled are those that are compelled as a pristine matter of deductive logic. Instead, the "dictated-by-precedent" line merely reflects the Court's purpose to protect the

states against federal habeas judgments based on genuine departures from the past.

The suggestion in Butler v. McKellar, 494 U.S. 407 (1990), that Arizona v. Roberson, 486 U.S. 675 (1988), advanced the law because the outcome in that case was previously "susceptible to debate among reasonable minds" is equally unservicable as an all-purpose test for new rules. The Court did not present the "reasonable-minds-might-differ" line as a universal standard, and if it were taken literally it could lead, once again, to the unacceptable conclusion that courts change substantive legal principles when they merely apply settled legal standards to particular cases. Justice O'Connor has explained that the state courts act reasonably within the meaning of Butler only when they adhere to established legal standards. And if a federal habeas court concludes that the facts in a petitioner's case are not distinguishable in a meaningful

and material way from the facts in the older cases that announced the legal standard on which he or she relies, the federal court can award relief without changing the law.

The initial step in a "new rule" case is to identify with as much precision as possible the petitioner's claim for federal relief and the abstract legal standard on which it rises or falls. That standard must be articulated at the proper level of generality. If it is stated either too generally or too specifically, the very purpose of the Court's retroactivity analysis will be frustrated.

Next, the federal court must determine whether the legal standard on which the prisoner relies finds support in the precedents in existence when the state courts acted. The standard for judging the content of then-prevailing law is objective. It is not dispositive that the authorities were in conflict or that, in other cases, courts or

individual judges have characterized legal rules as either well-settled or novel. At best, such characterizations are only evidence regarding the question of federal law to be decided by the federal habeas court--whether the precedents at the relevant time fairly can be said to stand for the proposition on which the prisoner now relies.

The claim that Kevin Taylor presents in this case rests on principles of procedural due process that were firmly settled long before his conviction became final and thus are fully applicable in federal habeas corpus. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. GRIFFITH v. KENTUCKY AND TEAGUE v. LANE EMBRACED BOTH JUSTICE HARLAN'S DISTINCTION BETWEEN CASES ARISING ON DIRECT REVIEW AND CASES ARISING IN HABEAS CORPUS AND HIS EXPLANATION OF WHAT COUNTS AS A NEW RULE FOR "RETROACTIVITY" PURPOSES.

In Griffith v. Kentucky, 479 U.S. 314 (1987), and Teague v. Lane, supra, this Court embraced the principal features of Justice Harlan's approach to deciding whether (and when) changes in the federal legal standards governing criminal cases should be applied "retroactively." First, changes in the law must always be applied on direct review, but should be applied in habeas corpus only in special circumstances. Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion). Second, the recognition of a new rule of constitutional law is a "complex" matter, requiring the federal habeas courts to "chart out the proper implications of the governing precedents at the time of a petitioner's conviction." Desist v. United

States, 394 U.S. 244, 263, 268 (1969) (dissenting opinion).

The adoption of Justice Harlan's sharp distinction between direct review and habeas corpus is a significant departure from the Court's previous approach to retroactivity. In Linkletter v. Walker, 381 U.S. 618 (1965), the Court assumed that the Constitution did not speak to whether a change in the law should be applied to cases already final. Irrespective of whether a case arose on direct review or in habeas, the Court decided whether a new rule could be applied to it by weighing the values that would be served by retrospective application against state reliance interests. Stovall v. Denno, 388 U.S. 293 (1967).

Now, the retroactivity question has been reconceptualized along the lines proposed by Justice Harlan. According to Griffith, the Constitution does govern cases arising on direct review and, in that context, requires

that new rules be applied both to the case at bar and to all other cases still subject to direct review.[3] According to Teague, cases arising in habeas corpus are controlled by the Habeas Corpus Act, which is construed to deny federal habeas relief on the basis of new rules, except in extraordinary cases.[4]

By contrast, the acceptance of Justice Harlan's approach to the identification of changes in the law marks no similar departure from the past. Even under the Linkletter approach, it was necessary to decide whether

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[3] In Mackey v. United States, supra at 681, Justice Harlan said that "a proper perception of [this Court's] duties... mandates that we apply the law as it is at the time, not as it once was." In Griffith v. Kentucky, supra at 322, the Court said that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."

[4] In Mackey v. United States, supra at 684, Justice Harlan said that "whether...new rules...should be applied 'retroactively'... must be considered...a problem as to the scope of the habeas writ." In Teague v. Lane, supra at 308, the Court adopted "Justice Harlan's description of the function of habeas corpus."

a rule was new in order to trigger the further inquiry whether, if it was, it should be applied retrospectively. When Justice Harlan dissented from the Court's decisions under the Linkletter regime, it was not because he concluded that the law had changed when the majority thought otherwise, but rather because the full Court refused to distinguish direct review and habeas cases as he insisted it should.

In Teague, even as the Court abandoned Linkletter's standards for determining the retroactive effect of new rules, the Court referred to Linkletter and other cases in the Linkletter line as examples of "new rule" determinations.[5] Accordingly, when the

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[5] The Court mentioned, for example, Johnson v. New Jersey, 384 U.S. 719 (1966), in which the Court held that the new rule announced in Miranda v. Arizona, 384 U.S. 436 (1966), would be applied only prospectively, and Desist v. United States, supra, in which the Court decided that the new rule established by Katz v. United States, 389 U.S. 347 (1967), would also be applied only to future cases.

federal habeas courts decide whether a rule is new for purposes of Griffith/Teague, they do nothing that they have not already been doing for nearly thirty years. The only difference is that the "new rule" question now arises only in the habeas context.

The Griffith/Teague framework thus does not import "new rule" issues into habeas cases where they would not have figured before. Nor does Griffith/Teague invite the states to make "new rule" arguments in ordinary habeas cases. In "ordinary" cases, "no question of retroactivity arises"--for the straightforward reason that courts, federal habeas courts included, "are as a general matter in the business of applying settled principles...of law to the disputes that come to bar." James B. Beam Distilling

Co. v. Georgia, 111 S.Ct. 2439, 2442 (1991).[6]

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[6] The abandonment of the Linkletter framework has put greater pressure on the proper understanding of when new rules are created. Under Linkletter and Stovall v. Denno, supra, state reliance interests with respect to prior law were addressed both indirectly and directly: indirectly when new rules were identified (largely on the ground that they marked a "clear break" from precedent), and directly when the retroactive effect of new rules was determined (largely by assessing the disturbance that retroactive application would entail). The Court's new framework retains only the first, indirect means of protecting state reliance interests. States' attorneys attempting to preserve state judgments can no longer argue simply and forthrightly that it would be disruptive to apply current legal standards to cases already final, but must funnel all their efforts into persuading courts that current law is different from what it once was. Bluntly put, states' attorneys may attempt to inflate the scope of what constitutes a "new rule" in order to defeat prisoners' claims. Justice Harlan understood this point and, accordingly, cautioned that his approach would require a careful analysis of the content of legal rules, lest these pressures lead courts to confuse the making of genuine changes in the law with the application of settled standards to analogous cases. Mackey v. United States, supra at 695 (separate opinion).

II. THE IDENTIFICATION OF NEW RULES PRESENTS A CHOICE-OF-LAW ISSUE TO THE FEDERAL HABEAS CORPUS COURTS AND DOES NOT AMOUNT TO A DEFERENTIAL STANDARD FOR REVIEWING STATE COURT JUDGMENTS.

The question whether a legal standard is new for retroactivity purposes presents a "choice of law problem." Mackey v. United States, supra at 682 (separate opinion by Harlan, J.). Justice Souter has explained why this is so:

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law....James B. Beam Distilling Co. v. Georgia, supra at 2443.[7]

[7] The Court has said that its approach to retroactivity in civil cases like James Beam may not track its approach in Griffith/Teague. Griffith v. Kentucky, supra at 322 n.8. Yet on this foundational level, there is and can be no difference between civil and criminal cases.

In habeas corpus cases after Teague, a federal district court must follow a two-stage analysis. Initially, the court must choose the applicable rule of law--by identifying "the rule on which the claim for habeas relief depends," Wright v. West, supra at 2501 (Souter, J., concurring), and ensuring that that rule prevailed at the time the petitioner's conviction became final. Then, the court must apply that same rule of law to the facts of the instant case.

This point has eluded Warden Gilmore, who misconceives Teague and subsequent cases to require the federal courts to defer to previous state judgments even if they were wrong, so long as they were not unreasonably wrong.[8] The test for new rules under the Griffith/Teague framework does not establish

[8] Brief for Petitioner at 22 (contending that the state courts no longer must reach "correct" decisions on federal constitutional claims, but rather are responsible only for "reasonable" judgments). Accord, Brief for Petitioner in Wright v. West, supra.

any such deferential "standard of review." Wright v. West, supra at 2497 (O'Connor, J., concurring). The federal courts do not deem previous state judgments regarding legal or mixed questions to be correct on the theory that those courts are in a better position than the federal courts to decide such matters. Id. at 2499 (Kennedy, J., concurring). In habeas corpus, indeed, a federal court does not "review" a prior state decision at all, but rather determines "whether the petitioner is 'in custody in violation of [federal law].'" Coleman v. Thompson, 111 S.Ct. 2546, 2554 (1991).

At least since Brown v. Allen, 344 U.S. 443 (1953), this Court has construed the Habeas Corpus Act to command the federal courts to exercise de novo judgment regarding the legal and mixed issues presented by properly preserved claims. E.g., Miller v. Fenton, 474 U.S. 104 (1985). Congress has adopted that interpretation--explicitly by

codifying Brown, and implicitly by rejecting bills that would have undercut Brown.[9]

Habeas corpus differs from direct review in that the procedural requirements petitioners must meet are different. And under Griffith/Teague, the legal standards that the federal habeas courts can consider may be different: changes in the law usually

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[9] In 1966, Congress adopted amendments to the Act, which: (1)added what is now §2254(a), explicitly codifying the federal courts' authority to receive petitions from state convicts; (2)specified in §2254(d) that the federal courts are to presume state findings of primary fact to be true in many circumstances, underscoring that state determinations of legal and mixed questions are not entitled to similar deference; and (3)established more stringent rules for multiple federal petitions from a single petitioner, again underscoring that a federal court is not constrained to accept a previous state judgment when a prisoner files an initial federal petition. For a fuller exploration of the implications of the 1966 amendments and their legislative history, see the briefs filed by amici in support of the respondent in Wright v. West, supra. Congress has repeatedly rejected legislative bills that would have required the federal courts to defer to previous state conclusions with respect to legal and mixed questions. Wright v. West, supra at 2498 (O'Connor, J., concurring).

cannot be applied. But when prisoners meet the procedural requirements for putting claims before the federal courts in habeas, and when those claims do not depend on changes in the law, the federal habeas courts have the same adjudicatory function that this Court has on direct review. Wright v. West, supra at 2497 (O'Connor, J., concurring) (explaining that the federal habeas courts have an obligation to "say what the law is"). In both instances, previous state judgments regarding legal and mixed questions are considered for the persuasive value they may have--but "without any hint of deference to the state courts." Id. at 2495.[10]

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[10] Put another way, a federal habeas court must give a petitioner's claim the same merits consideration it would have received in this Court on direct review of the state conviction. The legal standard this Court would have applied at that time is, by definition, the legal standard that prevailed when the prisoner's conviction and sentence became final.

The very purpose of the Court's new approach to retroactivity is to ensure that a prisoner's custody is based on a "correct application" of previously settled legal standards. Teague v. Lane, supra at 306-07, quoting Solem v. Stumes, 465 U.S. 638, 653 (1984)(Powell, J., concurring); Wright v. West, supra at 2499 (Kennedy, J., concurring) (explaining that the idea is to avoid upsetting a state judgment grounded in a "rule" that was "thought [to be] correct" at the time)(emphasis supplied)."[11] That purpose would be thwarted if the federal

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[11] The states' legitimate reliance interests extend only to the finality of correct judgments on federal claims. If, then, a federal court, applying a settled legal standard, concludes that the state courts reached a conclusion that was erroneous at the time, the federal court is duty-bound to award relief. State authorities may well have to expend resources to cure constitutional error identified in federal court, but interests in avoiding that kind of expense cannot justify withholding federal relief from a prisoner entitled to it. The federal courts' jurisdiction in habeas would otherwise be unintelligible.

courts were to defer to state judgments said to be minimally rational. Id. at 2497 (O'Connor, J., concurring)(noting that "a state court's incorrect legal determination" has never "been allowed to stand because it was reasonable").[12]

The current framework for retroactivity thus does nothing to the bedrock principle that a federal habeas corpus court must independently apply the applicable legal standard to facts of an individual case. Teague only instructs the court on what the applicable legal standard is. Nothing in that case suggests that, in applying a correct legal standard, a federal court is to

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[12] It would be circular, of course, to suggest that if a state judgment was "reasonable," it can be considered to have been correct. Thus this Court routinely determines the correct disposition of federal claims arising in habeas corpus, so long as those claims do not depend on a change in the legal standard that prevailed when the state courts acted. Richmond v. Lewis, 61 U.S.L.W. 4013 (Dec. 1, 1992); Estelle v. McGuire, 112 S.Ct. 475 (1991); Lewis v. Jeffers, 110 S.Ct. 3092 (1990).

suspend its own judgment in favor of a previous decision in state court. If a federal court were to do that, it would relinquish its very function under the Court's current framework: deterring state violations of federal constitutional rights.[13]

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[13] The Habeas Corpus Act incorporates the idea behind a "standard of review" only in that §2254(d) recognizes that the state courts may be in a position to determine primary, historical facts and thus directs the federal courts to defer to their findings in many circumstances. Wright v. West, supra at 2499 (Kennedy, J., concurring). With respect to legal and mixed questions, by contrast, the Act charges the federal courts to exercise independent judgment (invoking legal principles fairly supported by precedents previously in existence)--not to "review" state judgments (applying the same principles) on any deferential standard. It is because of the federal courts' duty to exercise de novo judgment in habeas that their different function in administrative law cases, in which they do review prior judgments on a deferential standard, is readily distinguishable. When a federal court reviews an agency's interpretation of an ambiguous federal statute, it has an entirely different assignment--pursuant to other statutes and precedents, which allocate authority between courts and administrative authorities in light of the expertise and political accountability of the latter. See Chevron U.S.A. v. Nat'l

III. TEAGUE AND ITS PROGENY ESTABLISH A PRECONDITION TO ADJUDICATION ON THE MERITS AND DO NOT ABRIDGE THE FEDERAL COURTS' AUTHORITY AND RESPONSIBILITY TO DETERMINE PROPERLY PRESENTED CLAIMS.

This Court's constructions of the Habeas Corpus Act sometimes recognize procedural barriers that prisoners must surmount in order to obtain an adjudication on the merits. In McCleskey v. Zant, 111 S.Ct. 1454 (1991), for example, the Court elaborated on the rules that discourage abusive successive petitions from a single prisoner. And in Wainwright v. Sykes, 433 U.S. 72 (1977), Coleman v. Thompson, supra, and other cases, the Court has established rules governing the effect to be given procedural default in state court.

Procedural rules of this kind ensure relatively smooth and efficient adjudication,

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Res. Defense Council, 467 U.S. 837 (1984). No such considerations inform the statutory scheme fixing the federal courts' function in habeas corpus.

with appropriate attention to the interests of the states. They do not abridge the substantive subject matter jurisdiction that Congress has conferred and this Court is bound to respect. If a petitioner successfully negotiates the procedural barriers that McCleskey and Coleman establish and thus presents a claim "in a proper procedural manner," there is no question that the federal court has the duty to adjudicate "all dispositive constitutional claims." McCleskey v. Zant, supra at 1462, citing Brown v. Allen, supra, and Wainwright v. Sykes, supra at 79. For it would be senseless to devise interstitial procedural rules that thwart the very jurisdiction they are meant to facilitate.

Likewise, the Court's construction of the Habeas Corpus Act in Teague addresses a threshold prerequisite for adjudication on the merits. Teague deals with the initial stage of retroactivity analysis (when the

federal court identifies the legal standard to be applied in habeas corpus) and does nothing to undercut the federal courts' function at the second stage (when the federal court applies that legal standard to the facts of the instant case). Claims that can be successful only if the federal courts announce and apply a genuine change in the law, like claims that are procedurally barred, are simply not properly before a federal habeas court for decision. Claims that rest on settled law, by contrast, are plainly cognizable under the jurisdiction that Congress has conferred.[14]

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[14] The Court has said that when the state contends that a claim is Teague-barred, the federal court must determine whether that is so and, if it is, whether the new rule applies retroactively, before passing on the merits in light of the appropriate legal standard for habeas adjudication. In this way, too, the Court has conceptualized Teague as a "threshold question" in habeas corpus. See Wright v. West, supra at 2500 (Souter, J., concurring).

Justice O'Connor made this point in Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992) (O'Connor, J., dissenting)(joined by Blackmun, Stevens & Kennedy, J.J.), when she listed Teague along with McCleskey and Coleman as "hurdles" that petitioners must clear before a federal court can take up the merits of their claims:

> But once [McCleskey, Coleman, Teague, and other hurdles] have been surmounted--once the claim is properly before the district court--a habeas petitioner, like any civil litigant, has...a right to a hearing where one is necessary to prove the facts supporting his claim. Keeney v. Tamayo-Reyes, supra at 1722 (dissenting opinion).[15]

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[15] The issue that divided the Court in Tamayo-Reyes was the appropriate standard to be applied when a prisoner's counsel in state court negligently failed to develop the facts supporting a claim, and the prisoner seeks a federal evidentiary hearing to complete the record. Justice White's majority opinion concluded that defaults with respect to the development of underlying facts should be treated in the same way as defaults with respect to legal claims themselves and thus held that, in either instance, prisoners must meet the Court's modern "cause-and-prejudice" tests. Justice O'Connor would have retained a waiver rule for defaults with respect to the development of facts. The focus in Tamayo-

Writing separately in Tamayo-Reyes, Justice Kennedy underscored that Teague, like McCleskey and Coleman, merely screens habeas petitions to isolate questions for fresh, independent adjudication on the merits:

> Our decisions in [Coleman, McCleskey, and Teague ensure] that the legal questions presented are ones which, if resolved against the State, can invalidate a final judgment. So we consider today only those habeas actions which present questions federal courts are bound to decide in order to protect constitutional rights. Id. at 1727-28 (emphasis supplied).[16]

Reyes on federal evidentiary hearings explains why the quotation in the text goes explicitly to that point, rather than to the more fundamental point that it assumes--namely that when claims are properly before the federal courts, those courts exercise independent judgment on the merits, with or without an evidentiary hearing.

[16] Indeed, all the opinions in Tamayo-Reyes are consistent with the understanding that Teague and its progeny leave intact the federal habeas courts' independent judgment regarding properly presented legal claims. Justice O'Connor grounded her dissent on the distinction between rules governing when a claim is properly before a federal court (where forfeiture rules like the "cause-and-prejudice" tests are appropriate) and rules going to the way in which a federal court adjudicates the merits (where, in her view,

IV. THERE IS NO TALISMANIC DEFINITION OF NEW RULES THAT GENERATES READY ANSWERS IN ALL CASES, BUT SOME GUIDELINES HAVE EMERGED TO INFORM THE FEDERAL COURTS' REASONED JUDGMENT.

When Justice O'Connor inaugurated the new approach to retroactivity in Teague, she said that "it is admittedly often difficult to determine when a case announces a new rule." Teague v. Lane, supra at 301. In this, she followed Justice Harlan, who also cautioned that the theory that the federal

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forfeiture rules are inappropriate). She, of course, put the rule implicated in Tamayo-Reyes (governing the development of primary facts) in the latter category.

Writing for the Court, Justice White did not reject the baseline distinction between door-keeping rules and rules touching the adjudication of properly presented claims. Nor did he deny that McCleskey, Coleman, and Teague are properly understood to establish "precondition[s] to reaching the merits...." Id. at 1719 n.3 (majority opinion). He differed with Justice O'Connor only in that, in his view, default rules with respect to the development of the factual record should be placed in the same category with procedural bar rules--and not (where Justice O'Connor would put them) in the (forbidden) category of rules that undermine the federal courts' statutory jurisdiction to determine properly presented claims independently.

habeas courts should not apply changes in the law was "complex." Desist v. United States, supra at 263 (dissenting opinion). In particular, Justice Harlan recognized the complexity of identifying when it is that a new rule has actually been created. In all prudence, then, Justice O'Connor made no attempt in Teague to "define the spectrum" of what may constitute a new rule. Teague v. Lane, supra at 301.[17] Nor have subsequent decisions tried to do that comprehensively.

The danger, of course, is that any attempt to capture new rules in a single definition for all seasons runs the enormous risk that other courts and lawyers might mistake such a definition for a mechanical device that neatly grinds out unimpeachable results in actual cases. Yet "new rule"

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[17] Of course, Justice O'Connor had no occasion in Teague to press these matters far. The legal rule for which the prisoner contended in that case would have been "new" under any plausible test.

cases by their nature defy any such simple resolutions. The establishment of a rigid formula for identifying new rules would frustrate the very principle on which Griffith/Teague proceeds, namely that "a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction." Desist v. United States, supra at 268 (Harlan, J., dissenting).[18] For this reason, the Court should continue on the course charted in recent cases, identifying guidelines that can inform the judgments that must be made.

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[18] Another amicus vividly illustrates this point. Teague hopes to foster state court obedience to prevailing federal constitutional law. Yet in the futile pursuit of a mechanical, "bright line" test for new rules, the Criminal Justice Legal Foundation proposes that Teague should bar federal consideration of any claim resting on a legal standard that departs from an "established state practice." Brief of the Criminal Justice Legal Foundation at 3. That test for new rules would pick out the very worst of the evil that Teague is meant to redress (repeated state court failures to respect federal law) and perversely shield that evil from federal evaluation.

The Court clearly has found legal standards to be new when they constitute "clear breaks" from the past. By contrast, the Court has consistently explained that the application of legal standards to different fact patterns rarely creates new rules--even though, in a system that depends on stare decisis for both stability and flexibility, a build-up of analogous precedents may reflect an incremental evolution in the law.

A. A genuine change in the law is typically made by discarding an established legal standard under which a claim would have failed and substituting a different legal standard under which the claim succeeds.

By all accounts, courts "make" new law when they jettison an established legal standard that, if controlling, would generate one result regarding a prisoner's claim, in favor of a competing standard that produces a different result. James B. Beam Distrilling Co. v. Georgia, supra at 2443. Accord Desist v. United States, supra at 248.

New rules are established under this heading when courts overrule precedents, disregard prior authority sub silentio, or "overturn[] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." United States v. Johnson, 457 U.S. 537, 551 (1982).[19] The classic illustrations are Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963), and Miranda v. Arizona, 384 U.S. 436 (1966)--all of which

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[19] This point accepted, Justice Harlan cautioned that there nonetheless may be instances in which legal standards, albeit still supported by precedent, have been so seriously undermined that professionals can have no confidence in their vitality. A federal habeas court does not establish a new rule by acknowledging that such a legal standard had ceased to be an accurate reflection of federal law when a prisoner's case was in state court and, accordingly, invoking the correct legal standard prevailing at that time to dispose of the prisoner's claim in federal habeas corpus. Desist v. United States, supra at 265 (dissenting opinion).

displaced prior law and thus established new rules for retroactivity purposes.[20]

B. A genuine change in the law is not typically made by applying a settled legal standard to a different pattern of facts.

The application of a legal standard established in one case to the different pattern of primary facts in another case does not ordinarily create a new rule:

> [W]hen a decision...has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases,...the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way. United States v. Johnson, supra at 549 (emphasis supplied).

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[20] Cases like Mapp, Gideon, and Miranda exemplify Justice O'Connor's generalization that a decision "announces a new rule when it breaks new ground or imposes a new obligation on the States...." Teague v. Lane, supra at 301. Decisions that are not such obvious "clear break" cases as express overrulings are treated in the same way if they genuinely change the controlling legal standard. Solem v. Stumes, supra.

The content of the law can be found in what judges do, as well as in what they say. Yet that realist insight does not and cannot obliterate the difference between law and its application in concrete cases. Abstract standards are real; they give structure and content to law and make it more than a ceaseless flow of decisions resolving isolated disputes ad hoc. Obviously, this Court has not held that, in any case in which a prisoner cannot "point to an old case decided on facts identical to the facts of his own," a federal district court can find the prisoner's claim meritorious only by changing the law. Wright v. West, supra at 2502 (Souter, J., concurring).[21]

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[21] Justice Harlan, too, noted that a court does not announce a new rule simply by applying a "well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." Desist v. United States, supra at 263 (dissenting opinion).

Moreover, reading new rules of law into cases in which unchanged legal standards are applied would, once again, merge the two independent stages of retroactivity analysis and put Teague on a "collision course" with the very substance of the habeas corpus jurisdiction conferred by Congress. Wright v. West, supra at 2498 (Kennedy, J., concurring), citing Miller v. Fenton, supra. As Justice Frankfurter wrote in Brown:

> [S]o-called mixed questions or the application of constitutional principles to the facts...leave the duty of adjudication with the federal judge....[A] prior State determination of a claim...cannot foreclose consideration of such a claim [in federal habeas corpus], else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. Brown v. Allen, supra at 507-08, 500 (separate opinion for a majority) (emphasis supplied).

1. The statement in Teague that a rule is new if it was not dictated by precedent at the time a case was in state court does not collapse the choice-of-law inquiry into a search for a precedent that logically compelled the state courts to find a petitioner's claim meritorious.

While Teague eschewed any single definition of new rules, the Court did say that, in "general," the federal courts should conclude that they must change the law in order to hold for a prisoner if the legal standard on which he or she depends was not "dictated" by precedent at the time the state courts acted. Teague v. Lane, supra at 301 (emphasis in original). Obviously, the Court did not have in mind precedents that compel results in later cases by irrefutable logic. Constitutional law may be many things, but it is not mathematics. Individual cases rarely are preceded by decisions "on all fours" with the facts. Lawyers typically argue by analogy from previous cases with similar fact patterns. Yet this Court has not, on that

account, sent the federal habeas courts off chasing precedents that precisely map the primary facts of the case at bar. Any such fact-centered understanding of new rules would fail once again to appreciate that the "new rule" problem is a matter of selecting the correct legal standard for federal adjudication of a prisoner's claim.[22]

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[22] Justice Scalia's dissent in Penry v. Lynaugh, 492 U.S. 302 (1989), is not to the contrary. Unlike the majority, Justice Scalia thought the relevant precedents in that case were sufficiently unclear to justify a holding that the Court had made new law via clarification. In service of his argument, he did use terms like "compelled" and "compulsion." Yet he scarcely suggested that the content of a legal standard is so inextricably linked to each and all of the facts in the case in which it is announced that it cannot be applied to another case whose facts differ in some way without the creation of an entirely new rule of law. On the contrary, Justice Scalia recognized that in a system "based on precedent and stare decisis," abstract legal standards must be distinguished from the primary facts in concrete cases. He simply disagreed with the majority regarding the content of the legal standard "in the present case." Id. at 353. In Saffle v. Parks, 494 U.S. 484, 488 (1990), the Court said that the question was "whether a state court...would have felt compelled by existing precedent" to find the prisoner's

In Teague itself, Justice O'Connor offered the "dictated-by-precedent" only as a way to "put...differently" the basic point that a new rule "breaks new ground." Teague v. Lane, supra at 301.[23] More recently, she

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claim meritorious. That line followed a recitation of other guiding principles, however, and thus cannot be read to abandon everything else the Court has said about new rules and to transmute the "new rule" inquiry to a formalistic exercise in deductive logic. The Court went on in Parks to explain that the prisoner's claim necessarily depended on a legal standard for which precedents at the critical time did not stand.

[23] The "dictated-by-precedent" phraseology was original with Teague. Yet the Court cited generally to Justice Powell's dissent in Truesdale v. Aiken, 480 U.S. 527 (1987). Justice Powell read the per curiam in Truesdale to be based on the assumption that Skipper v. South Carolina, 476 U.S. 1 (1986), had "applied the settled principles" in Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), to a "new fact situtation." Truesdale v. Aiken, supra at 528. Justice Powell expressed no disagreement with the proposition that, if Skipper had merely applied settled principles to "new" facts, it followed that Skipper had not changed the law for retroactivity purposes. He simply disagreed that Skipper was based on the earlier cases. By Justice Powell's contrary account, Skipper announced a new rule of law, because it "broke new ground." Truesdale v. Aiken, supra at 529.

has made it clear that she intended no departure from Justices Frankfurter and Harlan regarding the federal courts' authority to apply settled standards to analogous cases. Wright v. West, supra at 2497 (O'Connor, J., concurring). Thus the "dictated-by-precedent" line merely reflects Teague's purpose to avoid subjecting the states to a regime in which their judgments are upset by "changing" a rule of law "once thought correct but now understood to be deficient on its own terms." Id. at 2499 (Kennedy, J., concurring).

Thus the single authority the Court cited in Teague to explain the "dictated-by-precedent" formulation was an opinion by Justice Powell that both accepted the understanding that the application of a legal standard to "new" facts does not create new law, and endorsed the understanding that the best test of whether a legal standard is new is whether it clearly breaks with prior law.

2. The statement in Butler v. McKellar that reasonable minds might have differed regarding the proper outcome of that case at the time the state courts acted cannot be read to mean that a federal court must defer to a previous state judgment so long as it was "reasonable" in light of then-existing legal standards.

In the course of deciding whether Arizona v. Roberson, supra, had changed the law, this Court said in Butler v. McKellar, supra at 415, that the "outcome in Roberson was [previously] susceptible to debate among reasonable minds."[24] That line in Butler is equally unavailing as a neat and simple definition of new rules. The Court did not offer it as a test for new rules at all. If

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[24] The petitioner in Butler contended that his claim under Edwards v. Arizona, 451 U.S. 477 (1981), rested on the legal standard in Edwards itself and, accordingly, that he could be awarded relief in habeas corpus without the invocation of a new rule of law. This Court held, however, that a key circumstance in Edwards was not reproduced in the Butler petitioner's case and, therefore, that the prisoner in Butler could only succeed if he were given the benefits of Roberson, supra. The Court used the "reasonable-minds-might-differ" line by way of explaining that Roberson had been an advancement from Edwards.

it were taken for such a test, it would lead to senseless results.

It would be untenable to propose that new rules can be understood in such a fact-directed manner. The federal habeas courts must focus on the abstract legal standard that prevailed when the prisoner was before the state courts. Only in that way can the federal courts treat habeas cases uniformly, applying the same (settled) legal standard to all comers. If a new rule of law were generated each time a federal court applied a settled legal standard to a different pattern of primary facts, the system would be rife with inconsistency. Modest differences in factual circumstances, judged by different federal courts, would produce inconsistent results. Plainly, then, new rules for retroactivity purposes must be new rules rather than new applications of old rules.

Accord Wright v. West, supra at 2497 (O'Connor, J., concurring).[25]

Moreover, whenever a case receives sufficient attention to produce a published

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[25] A petioner may ask a federal court to apply a settled legal rule in factual circumstances that differ so materially from the circumstances in which (and for which) the rule was established that an award of relief to the petitioner could not fairly be said to be grounded in the original rule at all, but, instead, would have to rest on a departure from that rule. This Court recognized as much in Stringer v. Black, 112 S.Ct. 1130, 1135 (1992), when it explained that Teague bears on the application of law to fact when a prisoner seeks the application of a settled rule in a "novel setting." In most instances, the question whether a prisoner's claim depends on a change in the law can be answered by identifying the legal standard on which he or she relies and comparing that standard to the standard that prevailed when the case was in state court. In some cases, however, it is necessary to examine the legally significant facts of the case at bar and relevant precedents. This is what Stringer makes clear. Of course, this second leg of Stringer's analysis only poses the same question at a different level. Irrespective of whether a "new rule" issue can be approached in the usual way by examining only the content of an abstract legal standard, or demands a more fact-sensitive inquiry, no case presents a genuine retroactivity problem in the absence of an objective change in substantive law.

opinion (and thus a precedent for other cases), it is probably because there are "reasonable" arguments on both sides regarding the application of a legal standard to the facts and, accordingly, the proper "outcome." If the mere existence of such differences of opinion regarding the correct outcome regarding a petitioner's claim when the parties were in state court made it necessary for a federal court to create new law in order to arrive at a different result, then every case would be a "new rule" case. That cannot be the law. The federal courts do not change legal standards whenever they differ with the state courts in the results they reach. Butler does not equate ordinary federal adjudication with the creation of entirely new legal standards--cynically forbidding the federal habeas courts to perform the very adjudicatory function that Congress has assigned to them.

As Justice O'Connor has explained, Butler does not require a federal habeas court to defer to a previous state judgment within "reasonable" bounds. Instead, a federal court must independently decide whether the legal standard on which a prisoner rests his or her claim for federal relief is "meaningfully distinguishable" from the standard that prevailed when the state courts acted. And if "a proffered factual distinction" between the prisoner's case and pre-existing precedents fails to "change the force with which [the principle underlying those precedents] applies," then any "deviation" from that principle by the state courts was "not reasonable" within the meaning of Butler. Wright v. West, supra at 2497 (O'Connor, J., concurring).

On the very day that Butler was decided, Justice Kennedy analyzed the "new rule" issue in Saffle v. Parks, supra, as precisely the choice-of-law question it was. The prisoner

in Parks argued that his claim was grounded in settled legal standards. Justice Kennedy refuted that contention not by speculating about whether "reasonable" minds might have thought otherwise, but by carefully exploring the content of the legal principles reflected in the relevant precedents and concluding that they would not support the petitioner's current claim.

More recently, in Stringer v. Black, supra, Justice Kennedy again made it clear that a petitioner's ability to claim habeas relief under a legal standard depends on whether that standard can be traced to the precedents that prevailed when the case was in state court. Referring expressly to Butler, Justice Kennedy explained that the federal court's inquiry demands more than conjecture about what it might have been "reasonable" to think at that time; it demands an "objective reading of the relevant cases." Id. at 1140.

Given the way in which the "reasonable-minds-might-differ" line was delivered in Butler, and the way in which this Court has examined "new rule" questions since, it is untenable to read that line as the radical revisionism that Warden Gilmore assumes it to be.[26] This Court's retroactivity doctrine simply does not eviscerate the federal courts' statutory jurisdiction to enforce settled legal standards in habeas corpus.[27]

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[26] Brief for Petitioner at 22.

[27] In the 102d Congress, the House of Representatives approved a bill that would have added the following section to the Habeas Corpus Act:

> In an action filed under this chapter, the court shall not apply a new rule. For purposes of this section, the term "new rule" means a clear break from precedent, announced by the Supreme Court of the United States, that could not reasonably have been anticipated at the time the claimant's sentence became final in State court. H.R. 3371, tit. XI, §1104, 102d Cong., 1st Sess. (1991).

An accompanying report explained that this provision was meant to "reject[]" the definition of a "new rule" suggested in Butler--that a rule is "new" if, "at the time

C. The federal court must identify the legal standard on which the petitioner relies (at the appropriate level of generality) and decide (objectively) whether the precedents previously in place can fairly be said to support it.

When the state contends that a claim is Teague-barred, a federal court must first identify "the rule on which the [petitioner's current] claim for habeas relief depends," stated at the proper level of generality. Wright v. West, supra at 2501 (Souter, J., concurring); accord id. at 2497 (O'Connor, J., concurring).[28] Since, at this first

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the State courts considered a petitioner's claim, the claim was susceptible to debate among reasonable minds." H.R. Rep. No. 102-242, 102d Cong., 1st Sess. 130 (1991); see H.R. 101-681, 101st Cong., 2d Sess. 122-28 (1990). A majority of the Senate voted to conclude debate on the bill, but a filibuster and a veto threat from President Bush prevented final action. For the House votes on H.R. 3371, see 137 Cong. Rec. H8005 (Oct. 17, 1991); 137 Cong. Rec. H11756 (Nov. 26, 1991). For the last cloture vote in the Senate, see 138 Cong. Rec. S6226 (Oct. 2, 1992).

[28] The legal standard on which the petitioner depends is not, of course, coextensive with the precedents cited in

stage of retroactivity analysis, the federal court is charged to identify the applicable rule of law for federal habeas adjudication, it follows that such an abstract rule must be articulable at a level of generality greater than the facts of any case. Accordingly, the focus at this threshold stage is on a precise articulation of the legal standard on which a prisoner's claim actually rises or falls, abstracted from any precedents said to support it.[29]

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brief. Much of the confusion below in this case, and in other cases like it, arises from undue focus on recent precedents and the dates on which they were established. When prisoners refer to decisions rendered since they were in state court, it may be assumed too quickly that their legal claims necessarily rest on recent case law and thus cannot be considered.

[29] In this case, for example, Warden Gilmore's characterizations of People v. Reddick, 123 Ill.2d 184, 526 N.E.2d 141 (1988), and Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990), only distract attention from the real question: whether the legal standard on which Kevin Taylor's current federal claim depends was in place when his conviction became final.

If the rule on which a prisoner rests is articulated too generally, e.g., a denial of fair process, then no case would call for the announcement of a new rule. That, of course, would thwart Teague's purpose to avoid upsetting state court judgments on the basis of genuine changes in the law. If the legal standard is stated in extremely narrow, fact-specific terms, then every case would seem to be a "new rule" case. That, too, would frustrate the two-stage analysis of retroactivity cases. For again, the primary facts of one case are never completely reproduced in another. If minor factual variations between cases seemingly governed by the same legal standard were regarded as variations of the standard itself, and each such variation were taken to be a genuine change in the law, then the sum total of "new rule" cases would fill up the universe of the possible cases that can reach the federal

courts in habeas.[30] The task is to get the level of generality right. To do that, a federal habeas court cannot simply accept the characterizations given by the prisoner or state's attorneys, but must make a reasoned judgment that is sensitive to the subtle jurisprudential issue at hand.[31]

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[30] In this respect, it is well to keep in mind Justice Fortas' warning that if state courts doubt the wisdom of the course this Court charts in constitutional law, they may be inclined to "disregard the plain purport of [this Court's] decisions and adopt a 'let's-wait-until-it's-decided' approach." Desist v. United States, supra at 277 (dissenting opinion). If the state courts are to be encouraged to "toe" the line drawn by settled law, there will be occasions when they can fairly be held to "anticipate" the clear direction in which the law is incrementally moving. Cf. Solem v. Stumes, supra at 647 (opinion of White, J.)(asking whether state authorities could have been expected to "anticipate" the development of a legal standard).

[31] Obviously, the task is not to identify a prisoner's legal standard at a fact-specific level after the fashion of Justice Scalia's contention that courts relying on "tradition" to fill in the content of liberty within the meaning of the due process clause should look no further than historical practices defined at the most "specific" level available. Michael H. v. Gerald D., 491 U.S. 110, 127-28

Next, the court must determine whether the legal standard on which the petitioner relies can fairly be said to have prevailed when the state courts acted. This task demands an "independent evaluation" of the precedents at that time. Wright v. West, supra at 2497 (O'Connor, J., concurring). Much "time and effort" may be spent "scrutinizing" the relevant body of "federal law." Id. Only if the legal standards

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n.6 (1989). The point of that line of argument is to restrict the ability of life-tenured judges to defeat majoritarian policies by reference to traditions described in terms so expansive that they do not seriously check judges' own value judgments. Here, of course, the federal habeas courts are not engaged in establishing propositions of federal constitutional law in the first instance, but rather are enforcing legal standards that are already in existence. Their function is to state a legal standard accurately (at the level of generality it genuinely commands), not deliberately to state it inaccurately (by tying it to factual circumstances that are not material or, indeed, by attempting to err on the side of being too specific). In any case, Justice Scalia's argument has been rejected even in the context in which he has advanced it. Planned Parenthood v. Casey, 112 S.Ct. 2791, 2805 (1992)(joint opinion by O'Connor, Kennedy & Souter, J.J.).

reflected in the precedents can be "meaningfully distinguished" from the standard the prisoner asserts in federal habeas can the court conclude that that standard is new and thus unavailable. Id.

The inquiry into the content of a legal standard is "objective." Id., relying on Stringer v. Black, supra at 1140.[32] The mere existence of conflicting authorities is not conclusive. Nor is it decisive that

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[32] The Court has said that its approach to retroactivity "validates reasonable, good-faith" state decisions. Butler v. McKellar, supra at 414. Yet as the subsequent Stringer decision makes clear, that does not mean that the availability of a legal standard in federal habeas corpus turns on the subjective attitude of the state judges who previously found a prisoner's claim to be without merit. Teague has nothing to do with challenging the professionalism of state judges; it has everything to do with curing their honest mistakes with respect to existing federal law. References in some opinions to "good faith" and "subjectivity" cannot be understood to transform retroactivity anaylsis into an assessment of state judges' personal blameworthiness. E.g., Penry v. Lynaugh, supra at 350 (Scalia, J., dissenting); Truesdale v. Aiken, supra at 527 (Powell, J., dissenting).

previous opinions have characterized a case as either establishing a new rule or simply applying a settled legal standard to a different fact pattern. See Butler v. McKellar, supra at 415. Courts and judges, members of this Court included, sometimes make mistakes about an existing rule of law. A federal habeas court does not ineluctably create new law when it later identifies and applies the correct, settled standard. If that were true, then, again, the very purpose of the Griffith/Teague framework (the deterrence of such mistakes by state courts) would be frustrated.[33]

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[33] When an executive officer attempts to defeat liability for damages on the ground that he or she acted in "good faith," albeit in violation of a civil plaintiff's rights, the federal courts must determine whether, in light of the legal materials then in existence, the officer can be said to have acted "reasonably." In that context, too, this Court has counseled that previously prevailing legal standards should not be articulated at an unrealistically high "level of generality," because an inappropriate risk of liability might deter competent men and women from taking public jobs or, having taken

Moreover, courts typically insist that the results they reach are supported by precedent, the better to parry dissenters who typically insist that new law is being forged. It would be unrealistic to attach decisive import to such characterizations when they probably reflect disagreement about

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them, from performing their duties with appropriate zeal. Anderson v. Creighton, 483 U.S. 635, 639 (1987). It may well be that executive officers in the field cannot fairly be expected to parse dense legal materials and arrive at the correct understanding of prevailing law and that personal liability for damages may often be an unjustified penalty to be attached to the fault that can be ascribed to them. In any case, sensitive to the consequences of stating legal standards at a high level of generality in the qualified immunity context, the Court has effectively instructed the federal courts to err in the direction of being too specific. In habeas corpus, by contrast, the federal courts must identify legal standards at the correct level of generality. State judges whose erroneous judgments may be set at naught are not personally exposed to liability for their mistakes, and there is no analogous justification for giving them the benefit of the doubt. Rather, there is every reason for insisting that the state courts grasp federal law correctly in order to fulfill the purpose of habeas corpus as a safeguard against state failures to respect existing federal legal standards.

whether a legal standard is substantively sound rather than about whether, whatever its strengths or weaknesses, it is new.[34] What other judges have said about a legal standard is only evidence to be considered by the court charged to make its own, independent judgment on a "new rule" question.[35]

Finally, the federal court must apply the correct legal standard to the facts of the case at bar.

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[34] Cf. Forsyth County v. Nationalist Movement, 112 S.Ct. 2395, 2406 (1992) (Rehnquist, C.J., dissenting)(pointing out that "a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case").

[35] Judges can disagree both over whether a legal standard is sound and over whether it marks a significant departure from the past. What they say with respect to the former issue should not, for the reasons stated in the text, be mistaken for evidence regarding the latter issue. What they say regarding the latter, moreover, is merely evidence to be considered by the federal habeas court that has the duty to decide, as an independent federal question, whether the law has genuinely changed.

V. THE CLAIM PRESENTED BY THE RESPONDENT IN THIS CASE DOES NOT DEPEND ON A NEW RULE OF LAW WITHIN THE MEANING OF TEAGUE AND ITS PROGENY.

Approached in this way, the case at bar is not all so difficult. Stripped to the bone, Taylor's due process claim is that, having once established that he could not be convicted of murder if the jury was convinced that he killed his victim only when provoked into an intense passion, the state nonetheless refused to allow him to be heard before the jury on that question.

It has long been settled law that a defendant cannot be convicted of an offense if the trier of fact determines the existence of an affirmative defense recognized by state law. Taylor cites a host of precedents on this fundamental principle, including decisions rejecting conclusive presumptions in state criminal cases. The constitutional flaw in a conclusive presumption, of course, is that it withdraws from the trier of fact a

matter that must be determined against the accused in order to convict. Functionally, what happened in this case is precisely what happens in conclusive presumption cases: the jury was effectively directed to convict Taylor of murder, even if it was convinced that he had established the requisites for a manslaughter conviction. Yet under Illinois law, if the elements of manslaughter are found, a defendant cannot be convicted of murder.[36]

Taylor's current claim for federal habeas corpus relief does not depend on a legal standard for which the precedents on

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[36] Gilmore attempts unsuccessfully to characterize Taylor's claim as something more novel and also insists that erroneous jury instructions regarding a matter of state law cannot violate due process. That line of argument proves too much. The states rarely have an affirmative obligation to do anything. The very point of the due process clause is that, once a state chooses to create an entitlement as a matter of state law, it must administer that entitlement in a procedurally fair manner. Here again, the precedents in point are legion. E.g., Hicks v. Oklahoma, 447 U.S. 343, 346 (1980).

the books when his sentence became final cannot fairly be said to stand. The due process principle he asserts is not "new" within the meaning of Teague, and the federal habeas courts are thus empowered and obliged to enforce it de novo.

CONCLUSION

For the foregoing reasons, these amici respectfully ask the Court to affirm the judgment below.

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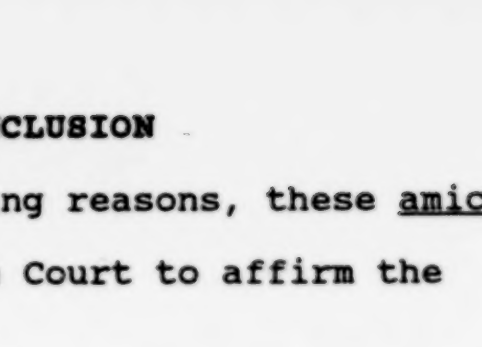
By: 

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served three (3) copies of this brief amici curiae, by first-class mail, postage prepaid, upon each person listed below:

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Dated this 8th day of January, 1993.